Jones Ceilings, Inc. *and* **Teamsters Local Union No. 676 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.** Cases 4-RC-11521 and 4-RC-14294

August 17, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On September 11, 1981, Administrative Law Judge Thomas A. Ricci issued the attached Decision in this proceeding. Thereafter, the General Counsel, Respondent, and the Charging Party filed exceptions and supporting briefs, and the Charging Party filed a brief in opposition to Respondent's exceptions.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[3]

For the reasons given by him, we adopt the Administrative Law Judge's recommendation to dismiss the allegation that Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee McRae. In this regard, however, the dissent focuses primarily on what the Administrative Law Judge himself notes; i.e., that there are some inconsistencies in the testimony supportive of Respondent's claim of economic necessity.[4] The Administrative Law Judge also found, however, and the dissent concedes, that Respondent did not need three full-time drivers. Thus, it is uncontradicted that when Bigelow became Respondent's purchasing agent in August 1980 he realized that Respondent did not need three full-time drivers and recommended that one driver be terminated. Respondent's president, Jones, after consulting with his attorney, decided to terminate the least senior driver, McRae, and informed McRae of his decision prior to what he believed was the day McRae planned to return from his leave of absence, September 1. Further, the record shows that subsequent to McRae's discharge Respondent has operated with only two full-time drivers, supplemented by sporadic use of casual drivers on an as-needed basis. Accordingly, we find, contrary to the dissent, that the timing of McRae's discharge was insufficient to establish that Respondent was discriminatorily motivated and that the General Counsel has not proven a violation here by a preponderance of the evidence.[5]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Jones Ceilings, Inc., Cherry Hill, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that in Case 4-RC-14294 the challenges to the ballots of John McGill

[1] On October 13, 1981, Respondent filed with the Board a motion to dismiss the petition in Case 4-RC-14294 based on its assertion that there is only one person left in the unit. Respondent contends that the petition should be dismissed as an election cannot be held in a one-person unit. On October 26, 1981, the General Counsel filed an opposition to Respondent's motion to dismiss, and on November 6, 1981, the Charging Party filed an opposition to Respondent's motion. The General Counsel and the Charging Party argue primarily that Respondent's motion deprives them of the opportunity to cross-examine witnesses and to otherwise examine in a formal proceeding Respondent's allegations concerning the size of the unit. Respondent's motion is hereby denied without prejudice to its right to file, in the event that the Union is certified, a proper motion to revoke certification.

[2] The General Counsel, the Charging Party, and Respondent have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] The General Counsel and the Charging Party except to the failure of the Administrative Law Judge to provide in his recommended Order for the disposition of the challenges in Case 4-RC-14294. In the election held on September 30, 1980, two votes were cast for and one against the Union, with three ballots being challenged. We adopt the Administrative Law Judge's recommendation that the challenge to the ballot of employee Gross be overruled, and it is therefore determinative. We accordingly find merit in the exceptions and shall dispose of the challenges in our Order herein.

[4] Our dissenting colleague also asserts that Respondent's bad motive is demonstrated by its willingness to "write off" McRae's $1,000 debt rather than risk his casting a prounion vote. Contrary to the dissent, however, nothing in this record demonstrates that Respondent had abandoned its right to seek repayment of the $1,000 advance to McRae. Accordingly, the dissent's comment in this regard is pure conjecture.

[5] In finding that employee McRae was lawfully discharged, the Administrative Law Judge questioned the General Counsel's assertion that Respondent has the burden of establishing that McRae would have been discharged in the absence of protected conduct. We note that in the circumstances here the General Counsel is correct. Thus, we conclude that here the General Counsel arguably made out a *prima facie* case that McRae's protected activity was a motivating factor in Respondent's decision to dismiss McRae in that McRae was discharged only 2 days after his conversation with Respondent's President Jones concerning the Union. Accordingly, as the General Counsel urged, under *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), the burden shifted to Respondent to demonstrate that the dismissal would have taken place even in the absence of the protected conduct. Nevertheless, as noted, the Administrative Law Judge ultimately found that Respondent adequately demonstrated that it did not need three drivers and McRae would have been discharged in any event. Accordingly, we agree with the Administrative Law Judge that the discharge of McRae did not violate the Act.

and William McRae be, and they hereby are, substained and that the challenge to the ballot of William Gross be, and it hereby is, overruled.

IT IS FURTHER ORDERED that the Regional Director for Region 4 shall, within 10 days from the date of this Decision and Order, open and count the ballot of William Gross and thereafter prepare and cause to be served on the parties a revised tally of ballots, upon which basis he shall issue the appropriate certification.

IT IS FURTHER ORDERED that Case 4-RC-14294 be, and it hereby is, severed from the proceeding herein and is referred to the Regional Director for Region 4 for further processing consistent herewith.

MEMBER FANNING, dissenting:

My colleagues concur in the dismissal of the 8(a)(3) charge as to truckdriver McRae. I cannot agree.

McRae was discharged on August 28, 1980, ostensibly because Respondent "could do with" two rather than three drivers. In early June, while unloading a truck, McRae suffered a heart attack. He was visited at the hospital by Controller Bigelow and told that there was "a job" for him when he was able to return. Bigelow's testimony was to that effect. About June 22 McRae was able to go to the plant to pick up his check which the Company was continuing to pay on a loan basis. McRae continued to do this weekly until some time after August 10.

The petition seeking a unit of drivers and warehousemen was received by Respondent on August 1.[6] On August 26 McRae advised warehouseman Gross that he could come back to work "on the first" meaning October, and Gross said "fine." McRae then talked with Bigelow, who suggested that the money advanced by Respondent as salary be taken out of McRae's pay a little at a time. Then, as McRae was leaving the company garage, President Jones saw him and took the occasion to tell McRae that a union was trying to get in, that Respondent did not want a union, and that Respondent had been generous to McRae. The latter then asked what the annual fall wage increase would be. Jones replied that he could not say. At this point McRae said that he did not know how he was going to vote. Two days later he was discharged by Jones, who gave as the reason that he could get along with two drivers. Jones testified that he understood that McRae wanted to come back as of September 1, hence the abrupt discharge. However, he also testified that he had "no pressing need" to let go of a driver on September 1. Also Jones admitted that it was his understanding that McRae was a "good worker." He did not recall whether McRae asked for part-time work but admitted that no part-time work was offered to McRae.

The Administrative Law Judge dismissed the 8(a)(3) allegation as to McRae, finding that the latter gave no indication to Jones that he, McRae, favored the Union, and that Respondent could not have known that McRae had signed a card. The Administrative Law Judge noted that because McRae was obligated financially to the Company it would have been good business to have kept him on the payroll and enhanced Respondent's chance of reimbursement by payroll deductions. However, he concluded that McRae was discharged because the Company found it "better business" to reduce its payroll.

In my view the willingness to forgo repayment of advances made to McRae has a significance that the Administrative Law Judge overlooked. Thus, the Company preferred to write off the advance of approximately $1,000 rather than risk a union vote by McRae. Hence it disregarded its promise that McRae would have a job when he recovered, and decided abruptly to discharge him just 2 days after he declined to reveal his intentions with respect to the Union. Whether Respondent knew that McRae had signed a card is immaterial. It was well aware that he was undecided how he would vote in what might well be a close election. While I agree that it is probable that Respondent, before August 26, did expect that McRae would be grateful and vote for it, as Bigelow testified, it lost little time in discharging McRae when he declined to confirm Respondent's expectations.

It is also worthy of note that the evidence in this record concerning the economic necessity for reducing the number of drivers is far from convincing. Documentary proof is totally lacking. While the Administrative Law Judge did note some inconsistencies in the testimony on business necessity, he concluded that the new system cost the Company pay for only 1 day a week "for a single outsider." Based on the following excerpts from the record testimony, I would conclude that the cost to Respondent amounted to the pay of a full-time truckdriver for at least 2 days per week:

Jones did not think "that Man Power employees and retiree Poole were driving and unloading as

[6] Seven votes were cast at the September 30 election, including that of employee John McGill, challenged by the Union and found by the Administrative Law Judge to be a supervisor. Respondent challenged McRae as no longer employed on the election date and the Board agent challenged employee Gross, whose name was not on the voting list. The Administrative Law Judge overruled this challenge, finding that Gross was a warehouseman, not a supervisor. Other unit members were drivers Loscalzo and Clark and apparently student Doug McGill and retiree Poole.

much as 2-1/2 days a week." Bigelow, when questioned by the Administrative Law Judge, estimated that the overtime worked by McGill (found to be a supervisor), by employees of Man Power, and by any part-timers amounted to "30 hours a week sometimes"; but, when questioned later by Respondent's attorney, amended that estimate, saying that was a "high guess, that it was sometimes less than 30 hours a week, that sometimes only the 2 full time drivers worked," and also that "sometimes third truck drivers were used only 5 or 10 hours a week." Bigelow, recalled at the end of the hearing, was asked if 30 hours a week would be a high range, and he responded, simply, "yes."

Given the imprecise character of the testimony on Respondent's economic necessity for the McRae discharge, and the testimony of Jones that he had no pressing need to reduce the number of drivers from three to two on September 1, the discharge of McRae on August 28 in violation of Section 8(a)(3) of the Act seems transparently clear. I would find that violation.

It is no answer to say, as my colleagues do, that because Respondent ultimately—after discharging McRae—did not need three drivers "McRae would have been discharged in any event." That is speculation. Absent antiunion motivation, Respondent might simply have reduced the hours for the three, or offered McRae part-time work.

Unlike my colleagues, I would overrule the challenge to the ballot of McRae and count it along with the ballot of warehouseman Gross.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board having found, after a hearing, that we violated Federal law by illegally interrogating our employees and promising them economic benefits:

> WE WILL NOT question our employees as to their reasons for wishing to be represented by a union.
>
> WE WILL NOT promise economic improvements to our employees to induce them to abandon any prounion sentiments.
>
> WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act, as amended.

JONES CEILINGS, INC.

DECISION

STATEMENT OF THE CASE

THOMAS A. RICCI, Administrative Law Judge: This is a consolidated proceeding, joining an unfair labor practice and a representation election case, in which a hearing was held on July 13 and 14, 1981, at Philadelphia, Pennsylvania. In Case 4-CA-11521 the General Counsel issued a complaint against Jones Ceilings, Inc., here called the Respondent, on November 14, 1980; it was based on a charge filed on October 20, 1980, by Teamsters Local Union No. 676, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, here called the Union or the Charging Party. In Case 4-RC-14294, involving the same parties, an election was held by the Board on September 30, 1980, and the results were inconclusive because of pending challenges. The principal issue in the complaint case is whether a man was fired in violation of the statute; and the sole issues presented in the representation case are the eligibility for voting of two disputed employees. Briefs were filed after the close of the hearing by all parties.

Upon the entire record and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a New Jersey corporation, is engaged in its location at Cherry Hill, New Jersey, in the nonretail installation of ceilings and partitions. During the past year, in the course of its business at that location, it performed services valued in excess of $50,000 outside the State of New Jersey. I find that the Respondent is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICE CASE

The unfair labor practice part of this consolidated case centers upon the permanent release of one truckdriver, William McRae. The representation proceeding portion calls for resolution of the question whether two other men—John Magill and William Gross—were supervisors at the time of a Board-conducted election in September 1980 and therefore ineligible to cast ballots. There is really no substantial relation between the two aspects of the overall proceeding.

At the time of the events, about August 1980, there were seven employees in an agreed-upon bargaining unit which the Union sought to represent in collective bargaining at the Respondent's Cherry Hill location. Three were full-time truckdrivers and the rest were called warehousemen. As a group they stored the Company's products and parts there, kept records of things sold and delivered, and loaded the trucks. The material was deliv-

ered from there to dispersed locations, many of them in Philadelphia, where other employees of the Respondent worked at installing the ceiling parts at construction sites and other purchasers' places.

McRae was hired on February 15, 1980. He suffered a heart attack on June 4 while on the job, was rushed to a hospital, and was physically unable to work again until October 1. On August 28, Thomas Jones, the Company's president, telephoned him at his home and told him "my services were no longer needed. That while I was sick he could make it with two drivers instead of three, he found out."

The complaint alleges that the McRae was discharged "because he supported the Union," and that the discharge was therefore a violation of Section 8(a)(3) of the Act. Denying any illegal purpose, the Respondent asserts the dismissal was an integral part of an efficiency-dictated decision to reduce the number of full-time drivers. And it is a fact that between June 4 and August 28 the Respondent hired no replacement driver but used two instead of three full-time drivers by eliminating a certain amount of wasted driving. In fact, by the time of the hearing 9 months later, it had again reduced the number of full-time drivers to only one, with the business otherwise operating as well as it had in the past.

A. *The Evidence*

Sometime during July there was a movement among these drivers and warehousemen towards joining Teamsters Local 676. McRae signed a membership card on July 28. On July 29 the Union filed a representation election petition with the Board and on August 1 it was received by the Respondent. Following a Stipulation for Consent Election the election took place on September 30; of seven eligible voters, six, including McRae, cast ballots. The results were inconclusive because of the challenges. There is evidence that Jones, the president, was opposed to having the Union represent these employees.

The evidence said to support the most essential element of the case against the Respondent—knowledge of the dischargee's prounion penchant—consists entirely of a short talk McRae had with the president of the Company before the day he was told he no longer had a job to return to. There is nothing to indicate, indeed it is not even contended, that but for that single conversation management had any reason to believe McRae favored the Union. In fact, McRae credibly testified that other than signing the union card he never went to any union meeting, did nothing to help talk it up, and no Company agent ever spoke of the Union to him.

There is a slight variance between McRae's and Jones' versions of what was said by either of them during the critical conversation, but it is of little moment because the substance of both versions is about the same. As to just when they met and talked, McRae put it at August 26, but the president was not sure, saying only it was "the first part of August." But before looking at the words that were spoken, it is important to understand the background giving meaning to the ideas that were then exchanged. It is against that significant, immediate past situation that both the General Counsel and the Respondent urge conflicting inferences to be drawn.

When McRae was in the hospital the day of his heart attack, Allen Bigelow, then comptroller of the Company, went there with McRae's wife to give him comfort and assurance. He told McRae to relax, that he had a job to come back to, and that "he [Bigelow] would make sure that I would get paid until money started coming in." And the Company did go right on sending McRae a weekly paycheck, as in the past, for the next 2 months, from early June until August, a total of over $1,000. The payments were discontinued when McRae began receiving unemployment benefits. It was always understood that McRae would one day reimburse the Company for the financial assistance, by some form of payroll deduction if necessary.

We come to the employee's conversation with the Company's president, whatever day it was, but surely before he was told he no longer had a job. McRae testified that, when his unemployment payments were discontinued, he came to the plant and talked to Bigelow and Gross, a warehouseman said to be a supervisor according to the Company. He said, among other things, that as he was leaving the garage, Jones called him apart and said ". . . you know this union is trying to get in and we're going to have an election. He said we've been very nice to you while you were sick. And I said yes thanks, and I appreciate it. He said, I hope you remember at the voting that we were nice to you. So I said, and he said, I wasn't aware of my drivers' needs. We're going to do something for you. I said, what are you going to do? He said, by law I'm not allowed to make you any promises or tell you that. So I said, with a statement like that I can't promise you anything, and I left."

Jones' pertinent testimony is as follows:

> I told him I wasn't interested in having a union represent the drivers, and he asked me if there would be an increase and I said there would be in October, October 15, when the normal increase would come about. He asked me how much that would be. I said I wasn't legally able to tell him how much the increase would be. He said it would help me in deciding which way I would go if you could tell me. He said he wasn't interested in joining the union, but he only needed enough money to pay his bills. I told him I couldn't give him any information as to what the increase would be.

A number of ideas emerge clearly from this conversation, whatever words were used. (1) Jones preferred a group vote against union representation; to say he was not "interested in having a union" is the same thing. (2) McRae wanted to know how much of a raise the employees would be receiving that fall. The Company had for some years given annual general percentage increases every October and although McRae had only been on the job since February he certainly must have known that. (3) Jones did not know how much the raise would be and left that question open. (4) McRae closed with saying he did not know which way he was going to vote.

I make two additional factual findings, based in part upon the foregoing cited testimony and in part upon the record as a whole. (5) Jones reminded McRae that day how generous the Company had been to him in advancing 2 months' unearned pay. Although in his version of the conversation Jones made no direct mention of the money advanced to the driver, he did not deny having spoken about it. Besides, it would have been a normal thing for him to have reminded the employee about it at the moment. (6) The conversation took place on August 26, as McRae testified. Jones was not clear as to the date and McRae in fact was at the garage that day, for he spoke to two other men, both of whom recalled their talk with him at that time.

Two days later McRae was told he would not be needed any more. If one looks only at the facts of record thus far stated, the inference of illegal motive suggested in the complaint appears in a certain light. After telling McRae that there was going to be an election and that he, the president, would rather the Union lost, and after reminding the man how kind the Company had been to him, it was but natural of the boss to expect the employee would return the courtesy by obliging him with a yes, that he would vote against the Union. Instead, McRae answers him with saying that unless he knows how much of a raise is coming, he is going to keep his mind open on the question of union or no union. Now, while this is not quite the same as where the employer asks the straight question—how are you going to vote? and commits a straight unfair labor practice in violation of Section 8(a)(1)—the two situations are not really different. Even if the second man equivocates, the suspicion of nascent animosity takes root. When to this is added the fact that the discharge came only 2 days later, the element of timing strengthens the inference of illegal motive.

Final decision, however, must rest upon the record as a whole. The strongest prop for the inference of prohibited purpose is the timing, just 2 days after Jones voiced his antiunion preference. But there is another possible explanation, no less persuasive, for his having passed the message of termination to McRae just at that time. When McRae visited the plant on August 26 he spoke to Bigelow and Gross, just before talking with Jones. He found occasion to tell both the other men he expected to be able to return to work "on the 1st." When he left, the others told Jones of this intention, or hope, of McRae's. They could not have told that to Jones before the president spoke to McRae for the driver said he just passed from one to the other as he was leaving the garage, a matter of minutes altogether. Up to that moment no one in the Company had any idea when McRae would be well enough to work at all. When a man, in such a circumstance, on August 26, says he expects to come to work "on the first," what he is saying is he will be back on the first of September. It will not do for the General Counsel to assert, as he does in his brief, that McRae meant "October 1," although he did not say that. It is the facts of what actually happened that govern here, not any unspoken, contrary intention. Management had a right to take McRae at his word.

If, as the Respondent contends, it had reason to believe it could do with two instead of three full-time drivers, as in the past, Jones had no choice but to call McRae and tell him so before the man reported for work 3 days later. This is not the case of a significantly timed discharge of a regular employee steadily at work with no advance notice. McRae had been off from work for 3 months. And even if management—be it Bigelow or Jones—had grounds for believing it could do with fewer men before August 26, there was no reason for advising McRae of the fact at all during that period, for no one knew when he would be well enough to work. In fairness, the thought could be carried further. The Respondent had been solicitous of his welfare for a long time, very much so. The longer it waited before giving him disturbing news, if in the end it had to be given to him, the better for his mental state of health.

The General Counsel makes much of the fact that when McRae talked with Bigelow on August 26, exchanging usual pleasantries as in the past, Bigelow said nothing about his, the manager's, repeated recommendations to Jones to reduce the number of full-time drivers. The fact is, however, that Jones had not yet, as of that moment, told Bigelow he had made a final decision on the matter. Jones hesitated long, and had to wait until he could get legal advice before discharging a man while the Union's petition was pending. Indeed, it may well be that he was moved towards the final decision by the very fact he heard later that day that McRae planned on returning on September 1. As to Bigelow, after taking pains to ease the driver's problems, as he had done, because of his heart condition, the last thing he would do is give the man advance news of discharge when for all he knew it might never have come about.

There is uncontroverted testimony that the Company in truth did not need three full-time drivers, got along perfectly well with only two. The system has always been, and still is today, to use the various warehousemen to help load the trucks. Whether the warehousemen, even before McRae took sick, also did some driving when necessary is not quite clear. But what the total testimony does make clear is that when he left warehousemen were in fact used on a part-time basis to drive the trucks and the system went on like that in June and July until Bigelow took over. It was he, as the new man in charge, who realized the entire shop could function more economically, and as efficiently as before, if more attention were paid to scheduling deliveries properly, so that there would be less driving back and forth to and from Philadelphia. It was such a system, eliminating entirely a third full-time man, that he recommended to Jones at the start of August.

Apparently there were times when warehousemen were not available to run the trucks as needed. The Company then turned to an outside organization called Man Power, apparently a group which furnishes truckdrivers on a basis of 1 day at a time. Again, whether the Respondent had occasion, even before McRae's heart attack, to use that source, the record is vague. But even assuming that the Respondent had never before paid anyone other than its cadre of regular employees, the only expense it incurred, while saving full-time pay for a fixed employee, was the "occasional," "sporadic," "when

needed" use of such outsiders. The cost must have been very little.

Asked at the hearing how many hours or how many days a week were such part-timers used, the witnesses kept jumping around: "About thirty hours," "8 to 16 hours a week," "many weeks there were none," Man Power was called "when either Walter Poole couldn't make it or Doug McGill couldn't make it on a given day." Were I to agree with the General Counsel on this record that the Company used "part-timers" an average of 2-1/2 days a week, it would mean that half of that 2-1/2 days, or maybe even only one-third, was Man Power outside. The use of the word "part-timer" is a distracting misnomer here, for all the people who did this work whenever they did it were full-time employees and not part-timers. In total, therefore, at best it would appear that in place of full weekly pay for a regular truckdriver, the new system only cost the Company 1 day a week of pay for a single outsider. Had the Company hired anyone else during that period who was not employed there before, surely Loscalzo and Clarke, the two remaining truckdrivers who testified for the General Counsel, would have known it and said so at the hearing.

I am not at all sure that had the Respondent stood silent and relied entirely upon the General Counsel's case for dismissal, it could be said a *prima facie* case in support of the complaint was proved. For one thing, McRae gave no indication to Jones he favored the Union and there is absolutely nothing to indicate the Company could otherwise have known he had signed a union card. He was obligated to the Company and Jones therefore had reasonable basis for believing, as he said he did, that the man would vote against the Union in return appreciation. More, the man owed the Company $1,000; to have kept him on the payroll would have greatly enhanced the chances it would be paid back by small payroll deductions. If the Company really had use for him, it would have been good business to keep him, union petition pending or not.

It is unnecessary to engage in polemics as to what would the Respondent have done if there had never been a union movement; would it have fired McRae anyway? The General Counsel argues this is what the Respondent must prove positively. I do not know what would have happened in a situation which never existed. I cannot know. But it is a fact that in this instance the inference of illegal motive is not strengthened by any inherent falsity in the asserted affirmative defense. I believe McRae was released because the Company found it better business to reduce its payroll, and that the record therefore, considered in its entirety, fails to support the complaint as to this discharge.

By the time the Union's organizational campaign came about in September 1980, the Respondent had established a predictable pattern of giving annual percentage raises in pay to its nonunion-represented employees, which included these warehousemen and drivers. In October 1978, it gave them all a 7-percent raise. In April 1979, it gave them 3 percent more and in October 1979 again a 7-percent raise. On October 1, 1980, it again gave 8-percent raises to all in the same category, office clerical and others, except for two drivers—Loscalzo and Clarke—and Gross, who worked in the warehouse.

The General Counsel and the Union argue that, based solely on the fact that the Respondent departed from its past practice of giving such raises to all its nonunion-represented employees, an unfair labor practice must be found. This record does not show why the raises were not given to these particular three employees. The election had been held the day before and the purpose of the apparent discrimination therefore could not have been to influence the vote. The mere fact of a partial departure from past practice of itself is not enough to prove affirmatively an illegal motive. If in any given case the unusual act can be called unlawful, it must be because of a basic conclusion that it necessarily had a coercive effect upon the employees. In this case nobody was told this was the reason for the Company doing what it did, or did not do. Every case cited by the General Counsel in his brief (*Olympic Medical Corporation*, 236 NLRB 1117 (1978); *Otis Hospital*, 222 NLRB 402 (1976); *Wells Fargo Alarm Services, et al.*, 224 NLRB 1111 (1976)), and every case cited in its brief by the Union (*Travis Meat & Seafood Company Inc.*, 237 NLRB 213 (1978); *Dorn's Transportation Company, Inc.*, 168 NLRB 457 (1967)) makes clear that the employer informed the employees it was withholding the periodic increases because of the pendency of a union petition, or because of the existence of a question concerning representation at one stage or another. That element, apparently an essential component for a finding of coercive intent, or effect, is lacking here. See the Respondent's case in support: *Hackethorn Manufacturing Co.*, 208 NLRB 302 (1974).

There is no allegation that these three men—Loscalzo, Clarke, and Gross—were selected for discrimination because of their individual prounion activities, as, indeed, there cannot be. There were seven eligible voters in the bargaining unit at the election the day before. Two voted for the Union, one voted against, and the three cast challenged ballots. For sure the Company could not have known how any man voted. Had management withheld the raise from the bargaining unit as a whole—all seven men—a plausible contention could be made that it tied the discrimination to the question of unionism. At the least the employees might have had basis for suspecting such a purpose. There is nothing to indicate Company knowledge of special status by any of the three men adversely affected. I therefore make no finding of illegality in the failure to grant raises to these three men at that time.

Loscalzo testified that on October 10, 10 days after the election, Bigelow called him to the office to ask: "He said management was very upset that we wanted the Union in there, and if I went in and talked to Mr. Jones that he was sure he would work something out with me. . . . He had that money to play with and he was sure that he would give us something, and he wanted me to go in and talk to him." It does not appear that Loscalzo pursued Bigelow's advice.

Bigelow denied ever speaking of the Union with this driver. I credit Loscalzo against Bigelow. I find that, by questioning him as to his reason for favoring the Union,

Bigelow did solicit his grievances as alleged in the complaint and that he thereby violated Section 8(a)(1) of the Act. I also find that, by telling the man the Respondent would somehow satisfy his grievance, he committed a further violation of the Act.

B. *The Challenges*

1. McGill

John McGill, who had for some time been the warehouse manager, became a part-time salesman before these events. He assumed a double position, working about 2-1/2 hours in the morning getting the warehouse work organized for the day and then doing the selling, some from his office in the plant, some by telephone, and some on the road outside. He was the first to arrive at 7 a.m. in the morning, distributed instructions to the drivers, saw that the trucks were loaded properly, etc. The Union challenged his vote at the election, contending he is a supervisor; the Company disputes this.

I find McGill was a supervisor at the time of the election and therefore ineligible to vote. He did not testify. The following testimony stands uncontradicted. Several employees testified they considered him their supervisor and regularly took orders directly from him. One day McRae asked him for permission to take 3 days off from work and McGill granted the leave right then and there. In May 1980, Loscalzo, the truckdriver, arrived late for work and McGill, alone, right off sent him home and suspended him for 3 days without pay in punishment. President Jones' testimony later, that if McGill did this it must have been a "hangover" from the past, will not do to dispel the authority so fully exercised by the man in question. When McGill suspended Loscalzo he also told him he, McGill, had been instructed by Bigelow, the conceded management agent, "to write down everything I do wrong. Write down every day I come in late." McGill also ordered Loscalzo to call him at home, if necessary, whenever he was going to be late, or absent. The man did that. Moreover, there is direct evidence that when, in the morning, the driving to be done was more than the two full-time men could do, McGill was authorized to decide, and did decide, whether anyone else was to be used. When necessary, he called the retiree Poole who always was used as a part-time driver, or he called Man Power, which then sent a man for the day.

Unlike the warehousemen and drivers, McGill was salaried, and received pay when out sick. He was clearly a supervisor within the meaning of the Act.

2. William Gross

This man was challenged by the Board agent because his name was not on the eligibility list. The Company contends he was a supervisor and therefore ineligible; the Union argues the contrary. Gross, like McGill, did not appear as a witness. I find he was not a supervisor, and that therefore his ballot should be opened and counted.

Gross works in the warehouse all day, keeping records of the products that come and go, helping load the trucks, and passing directions to drivers on the phone during the day when they call in for further delivery assignments. While Gross is also salaried like McGill, his pay is $11,400 a year; with the regular drivers earning about $4.50 an hour, his pay is therefore less than the rank-and-filers whom the Company says he supervises. Bigelow, as a witness, called him the warehouse manager, but there is no direct evidence about true supervisory function or practice. Despite Bigelow's conclusionary statement that Gross has power to hire and suspend employees, no proof was offered of any kind of his ever having exercised such authority. While it is true he tells the drivers where to go next when they call in, the fact is McGill spends a good part of the day in his office right there, so that when a witness said Gross holds the line and consults someone else before giving a direct order, I believe him.

And finally, over a seven-man unit, if McGill and Gross are included, it would mean three supervisors over five men—McGill and Gross, plus Bigelow. It would be too many.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III above, occurring in connection with its operations described in section I, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

It having been found that the Respondent violated Section 8(a)(1) of the Act with coercive inquiries and statements, it must be ordered to cease and desist therefrom.

CONCLUSIONS OF LAW

1. By interrogating employee Loscalzo as to his reasons for favoring the Union, and by promising him satisfaction of his economic grievances, the Respondent has violated and is violating Section 8(a)(1) of the Act.

2. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:

ORDER[1]

The Respondent, Jones Ceilings, Inc., Cherry Hill, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

[1] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Interrogating employees with respect to their reasons for favoring a union or promising them economic advantages to satisfy their economic demands.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed under Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Post at its place of business in Cherry Hill, New Jersey, copies of the attached notice marked "Appendix."[2] Copies of said notice, on forms provided by the Regional Director for Region 4, after being duly signed by its representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 4, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS HEREBY FURTHER ORDERED that the complaint be, and it hereby, is dismissed with respect to all other allegations of wrongdoing.

[2] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."